

SUNSHINE PERIOD

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Part 90 of the Commission's) PR Docket No. 93-144
Rules to Facilitate Future Development of) RM-8117, RM-8030
SMR Systems in the 800 MHz Frequency Band) RM-8029

and

Implementation of Section 309(j) of the)
Communications Act-Competitive Bidding) PP Docket No. 93-253
800 MHz SMR)

To: The Commission

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RESPONSE TO OPPOSITION AND MOTION
TO DISMISS UNAUTHORIZED PLEADINGS

On behalf of those parties, persons and entities represented within the documents filed with other agencies of the federal government (the "Parties")¹, to which Nextel Communications, Inc. ("Nextel") has taken offense within this proceeding, evidenced by Nextel's Opposition And Motion To Dismiss Unauthorized Pleadings submitted to the Commission on December 7, 1995, the following response is respectfully offered.

Nextel's strident objections to the presentation of courtesy copies to the Commission is baffling. It appears that Nextel is claiming that (A) citizens of the United States are precluded from requesting assistance and protection by all agencies of the federal government and that protest, suggestion, invitation, and respectful reflection of vital issues must be limited to a single forum; and (B) following the making of petitions or comments to other

¹ These parties are most often referred to as Fresno Mobile Radio, Inc. et. al.

agencies and departments of the federal government, those same citizens should not be allowed to present courtesy copies to the Commission. Indeed, this characterization accurately reflects Nextel's claims.

The Parties sought protection and assistance from other agencies of the federal government, and invited those agencies and departments to participate in this proceeding to assist the Commission in analyzing the effects of its intended actions as were described at the September 18, 1995 open meeting. The Parties believe that the perspective which might be provided by the other agencies would be quite valuable to the Commission in its efforts and would lend additional expertise that the Commission might lack.²

If and when the other agencies and departments might entertain the Parties' requests, the agencies' offering of comments and advice to the Commission would be outside the scope of the *ex parte* rules. Accordingly, such comments would be received by the Commission as interagency assistance without violation of the Commission's Rules regulating this proceeding. Therefore, assuming that such comments are or have been made, Nextel is not positioned to object to those agencies' acting to assist the Commission.³

² Nextel mischaracterizes the Motion to the Department of Justice as simply involving a request to determine the competitive impact of the Commission's intended action. In fact, issues arising out of the Sherman Antitrust Act are present within that Motion and such issues are directly within the jurisdiction and expertise of the Department of Justice.

³ If, as Nextel claims, the other agencies have not been properly informed regarding these matters, Nextel is free to file comments with those agencies and such action would be appropriate since the Commission is not positioned to regulate the actions of other federal agencies and the documents received thereby.

Nextel's claims that the Parties' actions are premature is wholly unfounded in view of the Commission's stated intentions within the September 18, 1995. The Parties were not guessing or speculating on the direction which the Commission was moving. The Parties' actions were based on the clear statements made by the Commission's personnel at that meeting.⁴ If the Commission's personnel's earlier statements were misconstrued by the Parties in their reports to other federal agencies, the Commission is well able to rectify these misimpressions in their contact with those agencies. However, at this time the Parties continue to stand by their perspective offered to each of the agencies, including the irreparable harm which would be visited on small business by adoption of the Commission's proposals.

Finally, the Parties would like to mention again that the documents submitted to other agencies, copies of which were submitted to the Commission, were courtesy copies. The Parties do the Commission an extreme disservice if they are unwilling to be fully candid with the Commission in their related activities before other agencies.⁵ Whether those documents are made a portion of the docket, relied upon by the Commission, or even read by the

⁴ The Parties note, however, that Nextel has had no difficulty within its Opposition describing with great particularity the guarantees to incumbents, the method of relocation, and other matters which go to the heart of the Commission's intended actions. Accordingly, it appears that Nextel is claiming that *only* Nextel knows the specific intentions of the Commission and the effects that it might have, while the remainder of the industry is woefully uninformed.

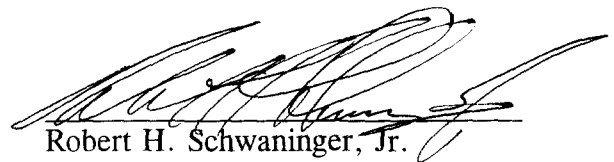
⁵ In fact, the Parties were assisting the Commission in any discussions which might have arisen between agencies. Certainly the Commission would have been at a disadvantage in those discussions if it did not have an opportunity to view those documents to prepare for such correspondence with other agencies.

Commission's staff is totally within the discretion of the Commission. The Parties take no position and do not presume to direct the Commission in this area. Accordingly, Nextel's Opposition is moot at best and more likely, simply misguided.

What is apparent, however, is that Nextel has employed this opportunity to file additional comments to this proceeding. Nextel's protest goes far beyond a legal/procedural complaint and goes far into support for auctions and mandatory relocation of existing operators. Nextel has gone so far as to point out the delay in the Commission's efforts to effect regulatory parity within Nextel's alleged time period of agency authority, see, Opposition at n. 2, suggesting that the agency's Congressional authority to adopt the subject proposals might have passed on August 10, 1994. This comment, albeit interesting, was not responsive to any document filed by the Parties and is only one of several examples of Nextel's use of this opportunity to restate its case. Therefore, it is apparent that Nextel is engaging formally in the very activity of which it accuses the Parties of doing informally.

In conclusion, it is unfortunate that Nextel has caused this controversy to arise to the distraction of the issues involved in this proceeding. The Parties are vitally interested in this matter and would prefer that the Commission and any assisting agency focus on the issues and the ramifications for small business, consumers, and the industry; and not on this distracting wrangling between commenters which simply disagree.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert H. Schwaninger, Jr.", written over a horizontal line.

Dated: December 14, 1995

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CERTIFICATE OF SERVICE

I hereby certify that on this fourteenth day of December, 1995, I served a copy of the foregoing Response to Opposition and Motion to Dismiss Unauthorized Pleadings on the following by placing a copy in the United States Mail, first class postage prepaid:

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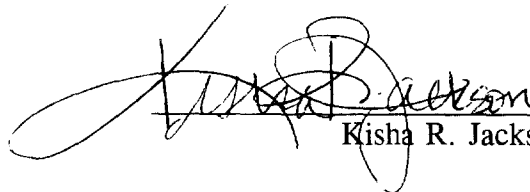
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